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No. 92-1799

In the Supreme Court of the United States

OCTOBER TERM, 1992

VISITING HOMEMAKER & HEALTH SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COMEN
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

11 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 989 F.2d 490 (Table). The decision and order of the National Labor Relations Board (Pet. App. A3-A11) is reported at 307 N.L.R.B. No. 90. The decision and direction of election in the underlying representation proceeding (Pet. App. A12-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1993. Pet. App. A2. The petition

for a writ of certiorari was filed on May 11, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a home health care agency from its facility in Mount Holly, New Jersey, providing in-home health care and personal, homemaker, and related services. Pet. App. A16. To deliver care to its clients, petitioner employs six registered and graduate nurses and 120 home health aides. *Ibid.* Responsibility for the overall management of petitioner's operations is vested in an Executive Director, a Director of Professional Services, and a Director of Human Resources. *Id.* at A17; C.A. App. 21a, 152a-154a. Petitioner also employs two coordinators who assist the Directors. Pet. App. A17-A18; C.A. App. 236a-248a.

When petitioner receives a request to provide service to a new client, the information obtained is given to the nurse assigned to the client's area, who visits the client at home, evaluates the client's needs, and prepares a nursing care plan. The care plan, which is subject to approval by the client's physician, is a list of recommended tasks and instructions for the client's family and for the nurse's aide pertaining to the home health care of the client. The nurse determines how many hours of service by an aide are appropriate for each client and how many days per week service should be provided. Pet. App. A16.

The aides are part-time employees who perform health care and related homemaker and personal services for petitioner's clients. The health care services include monitoring clients' temperatures, ad-

ministering medicine, turning bedridden patients, and aiding them in motion exercises. The homemaker services include housecleaning, laundry, sewing and mending, shopping, child care, running errands, and meal planning and preparation. The personal services include assisting the client in exercising and transporting the client for medical services. Pet. App. A16; C.A. App. 43a. On average, an aide spends two or two-and-a-half hours per visit in a client's home. C.A. App. 234a.

After the nurse has developed the care plan, a coordinator selects and assigns an aide to the client. Pet. App. A16. The nurse who prepared the care plan introduces the aide to the client, reviews the care plan with them, and instructs the aide on the proper procedures to be taken when caring for the client. C.A. App. 107a-109a, 181a-183a.

Nurses periodically visit the patients while the aide is present to assess whether the aide is properly carrying out the care plan and to hear the patient's concerns. The nurses discuss any shortcomings with the aides and report them to the coordinators or other management officials. The nurses, however, simply report infractions. Any discipline is imposed by the coordinators or higher management officials based on their own investigation. The nurses annually evaluate the aides' performance but their evaluations are not the basis for continued employment or wage increases. Pet. App. A17-A18.

2. In July 1991, the Jersey Nurses Economic Security Organization (the Union) filed a petition with the Board's Regional Office seeking to represent petitioner's nurses. Petitioner opposed the petition, contending that the nurses are supervisors within the

meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), in light of the authority they exercised over the home health aides, and are therefore precluded from asserting the Act's protections of organizational activity.[1] Pet. App. A16.

The Regional Director determined that the nurses are not statutory supervisors. He discounted petitioner's designation of the nurses as supervisors, noting that "an employer's designation of an employee as a supervisor is not determinative of supervisory status." Pet. App. A18. The Regional Director then noted that, under Board decisions, a nurse's direction of less skilled employees based on the nurse's professional judgment and as an incident of the treatment of patients is not indicative of supervisory status.[2] Finding that the nurses' direction of the work of the aides in this case is "incidental to their patient care responsibilities," he concluded that such direction

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[1] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and hence from the Act's protections, any "supervisor." "Supervisor" is defined in Section 2(11), as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[2] The Regional Director cited *Springfield Jewish Nursing Home*, 292 N.L.R.B. 1266, 1267 (1989); *Eventide South, a Division of Geriatrics, Inc.*, 239 N.L.R.B. 287, 289 (1978); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 193 (1976).

"does not confer supervisory status on the nurses." *Ibid.* Finally, the Regional Director found that the nurses have no real responsibility for hiring or disciplining aides, and do not effectively recommend changes in pay or tenure. *Id.* at A18-A19.

Accordingly, the Regional Director directed that an election be held in a unit of petitioner's nurses. Pet. App. A13-A14. The Board denied review of the Director's decision. *Id.* at A5 n.1. The Union won the election and was certified as bargaining representative of petitioner's nurses. *Id.* at A5.

3. Petitioner refused to bargain with the Union and to supply it with relevant information. The General Counsel issued a complaint charging petitioner with an unfair labor practice, and the Board entered summary judgment, ruling that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered it to bargain with the Union.[3] Pet. App. A6.

The court of appeals, by judgment order, enforced the Board's order. Pet. App. A1-A2.

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[3] Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer to refuse to bargain with its employees' bargaining representative. Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to interfere with employee rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, which include the right of employees to bargain through their chosen representative.

ARGUMENT

In determining that petitioner's nurses are not "supervisors" and that they are therefore entitled to bargain collectively through a union representative, the Board applied its long-standing rule that a nurse's direction of less-skilled employees, in the exercise of professional judgment and incidental to the nurse's treatment of patients, is not, by itself, sufficient to make the nurse a "supervisor" under Section 2(11) of the Act. 29 U.S.C. 152(11). Petitioner, acknowledging that "this issue of 'patient care' and its effect on supervisory status * * * is the heart of the instant petition" (Pet. 11), challenges the validity of the Board's rule. Pet. i, Question 1.[4]

While we believe that the Board's rule is a reasonable interpretation of the statute and accordingly is "entitled to deference from the courts," *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987), there is a conflict of decisions among the circuits that have addressed this issue. To resolve that conflict, we have recently filed a petition for a writ of certiorari seeking review of that issue. See *National Labor Relations Board* v. *Health Care &*

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[4] The second question presented by the petition asks whether the Board's rule "violate[s] the federal policy behind Section 2(11) of the National Labor Relations Act especially where the registered nurses provided the Employer's only on-site supervision for employees in the field." Pet. i. That reformulation of the issue does not raise a separate claim, but reflects a different way of presenting petitioner's contention that the Board's "patient care" rationale is an inadequate basis for finding that nurses with authority responsibly to direct other employees are not "supervisors" under Section 2(11).

Retirement Corp. of America, No. 92-1964 (filed June 8, 1993).[5] The decision in *Health Care & Retirement Corp.* presents a better vehicle for resolution of that issue than does this case, because, in that case the court of appeals issued a written opinion explaining its reasons for rejecting the Board's rule, and the decision discussed two prior circuit precedents examining the same issue. See 92-1964 Pet. 10, 16. In this case, in contrast, the court of appeals simply entered a judgment order. In addition, *Health Care & Retirement Corp.* presents a second significant question on which the circuits are divided: whether the Board permissibly requires the party who alleges that an employee is excluded from the Act's protections as a supervisor to bear the burden of proving the individual's supervisory status. 92-1964 Pet. I, 19-22. This case does not present that issue.

Accordingly, we believe that the Court should dispose of this petition as is appropriate in light of the Court's disposition of the petition in *Health Care & Retirement Corp.* If the Court grants the petition in that case, it should hold the petition here pending the outcome of that case. If the Court denies the petition in that case, it should deny the instant petition.

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[5] We have provided a copy of our petition in No. 92-1964 to the petitioner in this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as is appropriate in light of the disposition of the petition for a writ of certiorari in *National Labor Relations Board* v. *Health Care & Retirement Corp. of America*, No. 92-1964.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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